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No. 90-14

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT BRUCE RECKMEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly dismissed petitioner's motion under 28 U.S.C. 2255 without holding an evidentiary hearing, after concluding that the files and records of the case conclusively showed that petitioner had waived his right to the effective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is unreported. The opinion of the district court is reported at 709 F. Supp. 680.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1990. A petition for rehearing was denied on June 1, 1990. Pet. App. 1b-2b. The petition for a writ of certiorari was filed on June 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the 1970s and early 1980s, petitioner operated a massive marijuana and hashish distribution enterprise in the Eastern District of Virginia. Petitioner's organization generated more than $25 million in gross receipts. Petitioner himself realized at least $4 million in profits. In January 1985, after a lengthy investigation, petitioner and 24 members of his organization were indicted on a variety of narcotics, weapons, and income tax offenses. Gov't C.A. Br. 3-7.

Before trial, the government reached a plea agreement with petitioner, who was represented by retained counsel John M. Dowd. Petitioner agreed to plead guilty to four counts: one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, one count of unlawfully possessing firearms, in violation of 26 U.S.C. 5861(d) and 5871, one count of unlawfully transporting currency to a foreign country, in violation of 31 U.S.C. 5316, and one count of filing a false income tax return, in violation of 26 U.S.C. 7206(1). In exchange, the government agreed that petitioner would face a mandatory minimum sentence of 10 years' imprisonment and a maximum sentence of 20 years' imprisonment. The government also agreed to move to dismiss the remaining 20 counts against petitioner. In March 1985, after a thorough colloquy, the district court accepted petitioner's guilty plea. During that colloquy, the court asked petitioner if he was satisfied with Dowd's representation. Petitioner responded, "Very much so, your Honor." Gov't C.A. Br. 7.

After accepting the plea, the district court sentenced petitioner to a total of 17 years' imprisonment, which the court later reduced to 14 years' im-

prisonment. Petitioner did not appeal from that judgment. Gov't C.A. Br. 3.

2. In June 1988, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, alleging that Dowd had rendered ineffective assistance as a result of a conflict of interest. Petitioner asserted that "Dowd's personal knowledge of facts underlying the government's indictment and additional crimes committed to pay his fees created an actual conflict of interest that deprived [petitioner] of his constitutional right to effective counsel." Pet. App. 4a-5a.

According to petitioner, Dowd requested a $100,000 retainer when petitioner sought his services in April 1983 after learning of the grand jury's investigation. Petitioner initially paid Dowd $90,000. After petitioner fully explained "the details of his criminal involvement and his financial holdings," Dowd told petitioner "that he would need $500,000 to defend him." Pet. App. 5a.[1] Petitioner told Dowd that "any additional payments would come from profits of his illegal operations." *Id.* at 7. Dowd allegedly instructed petitioner to pay him from any avaliable source if petitioner wished to retain his services.

Over the next several months, according to petitioner, Dowd continued to press for payment and urged him to pay as much as he could before an indictment was returned. After petitioner told Dowd that he could obtain the needed cash only by smuggling the money into this country from the Bahamas,

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[1] That fee prompted petitioner to seek the advice of a family attorney, who told him to consider retaining another attorney. At petitioner's request, the family attorney investigated Dowd's background. After the attorney reported back that Dowd was reputable and competent, petitioner decided to continue to retain him. Pet. App. 5a-7a.

Dowd allegedly told petitioner to send someone to do it. Petitioner arranged to have one of his relatives smuggle the cash to pay Dowd's fees.[2] He then paid Dowd through cashier's checks made out to fictitious persons and through direct cash deposits into the bank account of Dowd's firm. Dowd allegedly gave petitioner the necessary deposit slips. Pet. App. 7a-10a; Gov't C.A. Br. 10-11.

Dowd continued to represent petitioner after the indictment was returned in January 1985, even though one of the overt acts involved a smuggling attempt allegedly done to pay Dowd's fees. As a result of the indictment, the district court detained petitioner pending trial and entered an order freezing all of his assets. Dowd visited petitioner in jail. According to petitioner, Dowd said he would no longer represent petitioner, "since he could not be paid." Pet. App. 11a. Several days later, however, Dowd allegedly told petitioner that he could continue to represent petitioner if petitioner agreed to Dowd's plan to evade the court's restraining order. Petitioner agreed and, in violation of that order, later caused $40,000 in cashier's checks to be delivered to Dowd and his secretary. Thereafter, Dowd continued to represent petitioner, but also continued to threaten to withdraw if petitioner did not continue paying him. Pet. App. 11a-12a; Gov't C.A. Br. 12.

After moving unsuccessfully to dismiss the indictment, Dowd advised petitioner to plead guilty. Dowd negotiated a plea agreement with the government un-

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[2] In August 1984, federal authorities arrested petitioner's brother-in-law as he was smuggling $100,000 into the United States. Pet. App. 9a; Gov't C.A. Br. 10-11. That episode was later charged as an overt act in the narcotics conspiracy count of petitioner's indictment.

der which petitioner would plead guilty to four felony counts and would face a maximum sentence of 20 years' imprisonment. According to petitioner, Dowd also "negotiated a 'side-deal' outside the plea agreement that required the government to provide a monthly stipend for [petitioner's] wife's living expenses." Pet. App. 14a.[3]

3. The district court dismissed petitioner's motion without holding an evidentiary hearing. 709 F. Supp. 680 (1989). As an initial matter, the court pointed out that petitioner

> is entitled to relief only if he demonstrates that his interest was in actual conflict with Dowd's, that this conflict had an adverse effect on Dowd's representation, and that he did not knowingly waive his right to conflict-free representation.

Id. at 688. Assuming petitioner's allegations to be true, the court concluded that Dowd represented petitioner in spite of a conflict of interest and that that conflict "had an adverse impact on Dowd's representation of petitioner." *Id.* at 691. Nevertheless, the court held that "undisputed record facts convincingly establish that petitioner waived his right to conflict-free counsel." *Ibid.*

The court found that, "[b]y petitioner's own admission, Dowd, over a two-year period, continuously pressured [him] to pay exorbitant fees and to do so

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[3] After petitioner was sentenced, he spoke with another attorney. That attorney advised him that Dowd "had a conflict of interest and that the conflict could have affected [his] representation." Pet. App. 15a. Petitioner then contacted the United States Attorney's Office and reported his fee arrangements with Dowd. Petitioner's allegations were investigated, but no criminal charges were ever filed. *Id.* at 15a-16a.

by illegal means using funds derived from illegal activities, namely drug trafficking profits." 709 F. Supp. at 691. The court further found that there was no "doubt that petitioner fully knew and appreciated the criminal nature of the currency smuggling and the various fee payment schemes." *Ibid.* "[N]otwithstanding persistent and mounting demands for greater and greater fees," the court pointed out, "petitioner chose to keep Dowd as his counsel." *Ibid.* The court concluded that "[t]o contend, as petitioner does, that he had no choice is arrant nonsense." *Ibid.*

Furthermore, the court noted that shortly before trial, "when Dowd refused to continue the representation because he could not receive more fees, petitioner did not retain new counsel or ask for appointed counsel." 709 F. Supp. at 692. Instead, petitioner continued to retain Dowd after agreeing to the "new scheme designed to circumvent the court order preventing funds transfers." *Ibid.* In these circumstances, the court found, "petitioner must have meant what he said when, in response to the plea judge's inquiry on whether he was satisfied with Dowd's representation, he said, '[v]ery much so, your honor.'" *Ibid.* The court therefore reached the "inescapable conclusion * * * that petitioner 'knew what he was doing, voluntarily made his own choice, and misled the trial court in the process.'" *Ibid.* (quoting *Bridges* v. *United States*, 794 F.2d 1189, 1194 (7th Cir. 1986)).

4. The court of appeals affirmed. Pet. App. 1a-32a. It "assum[ed] that the facts alleged demonstrate a conflict of interest between [petitioner] and Dowd that adversely affected Dowd's performance." *Id.* at 29a. The court of appeals concluded, however,

that "the facts alleged also demonstrate as a matter of law [petitioner's] knowing waiver of the right to conflict-free representation." *Ibid.*

The court found that petitioner "has admitted full knowledge of Dowd's alleged misdeeds" and "there is no question he knew that some of their joint actions were illegal." Pet. App. 29a. Petitioner chose to "rehire" Dowd, "[d]espite this knowledge," even after Dowd "dropped the representation upon learning that he could not legally be paid." *Id.* at 29a-30a. The court determined that "[t]hese facts plainly show that [petitioner] must have known that Dowd was self-interested and that his self-interest could run counter to [petitioner's]" and "that knowing all this, [petitioner] nevertheless decided to retain Dowd as counsel." *Id.* at 30a. The court recognized that "Dowd obviously never explained that his interests were in conflict with [petitioner's] in a way that might affect his representation." *Ibid.* The court concluded, however, that

> the only reasonable inference that can be drawn in logic from the facts alleged is that [petitioner] must have realized that Dowd's private interest would best be served by a quick and summary disposition that minimized any risk of inquiry into his own criminal culpability (if the facts be as alleged).

Id. at 30a-31a. Accordingly, the court held that since petitioner "inevitably understood and accepted the conflict of his interests with those of Dowd he * * * knowingly and voluntarily waived his right to conflict-free representation." *Id.* at 31a.

ARGUMENT

Petitioner contends (Pet. 29-56) that the district court erred in dismissing his motion under 28 U.S.C. 2255, which alleged that his retained counsel had rendered ineffective assistance as a result of a conflict of interest, without first holding an evidentiary hearing. Petitioner's contention is quite narrow. He concedes that a defendant may waive his Sixth Amendment right to conflict-free representation, see *e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980); *United States* v. *Bridges*, 794 F.2d at 1193, and he does not dispute that a hearing is unnecessary where "the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. 2255. Here, as both the district court and the court of appeals held, the record created by petitioner himself shows conclusively that he knowingly and voluntarily waived his Sixth Amendment right. In these circumstances, the courts below correctly concluded that an evidentiary hearing would have been superfluous.

According to petitioner's own account, during the two-year period that Dowd was retained he pressured petitioner repeatedly to pay hefty—if not exorbitant—fees through unlawful means, namely, using the ill-gotten profits from petitioner's drug trafficking activities. Moreover, petitioner conceded that he knew and appreciated the criminal nature of Dowd's alleged fee arrangement and the currency smuggling that made it possible. Despite these shadowy circumstances and Dowd's escalating fee demands, petitioner chose to keep Dowd as his counsel. Petitioner certainly knew "what he [was] doing and * * * made [his choice] with eyes open." *Adams* v. *United States*, 317 U.S. 269, 279 (1942).

In addition, having hired Dowd, petitioner undoubtedly "knew how to fire" him as well. *United States* v. *Elrod*, 716 F.2d 431, 439 (7th Cir. 1983). Indeed, even after a family attorney advised petitioner to consider hiring new counsel, petitioner chose to continue with Dowd as his counsel. And on the eve of trial, when Dowd once again threatened to withdraw, petitioner did not retain new counsel or seek court-appointed counsel. He chose instead to fall in with Dowd's new and unlawful scheme to circumvent the district court's order restraining the transfer of his assets. Finally, before entering his guilty plea, petitioner told the court that he was satisfied with Dowd's representation. 709 F. Supp. at 692.

On this record, it is inconceivable that petitioner did not know that "Dowd's private interests would be best served by a quick and summary disposition [of petitioner's case] that minimized any risk of inquiry into his own criminal culpability (if the facts be as alleged)." Pet. App. 30a-31a. This is precisely the sort of situation in which a defendant effectively waives his right to conflict-free representation. See, *e.g.*, *United States* v. *Bridges*, 794 F.2d at 1193-1195.[4] Accordingly, since "the files and records of the case conclusively show that [petitioner] is entitled to no relief," 28 U.S.C. 2255, the district court properly dismissed petitioner's motion to vacate his sentence without first holding an evidentiary hearing.[5]

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[4] For that reason, petitioner errs in asserting that the courts below "allocated the fault in this case to [him] (a layman) without affording that layman his day in court." Pet. 49.

[5] Petitioner errs in relying (Pet. 35-37) on decisions such as *Rosenwald* v. *United States*, 898 F.2d 585 (7th Cir. 1990), *United States* v. *Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989),

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and *Porter* v. *Wainwright*, 805 F.2d 930 (11th Cir. 1986). None of those decisions suggested—much less held—that a court must hold an evidentiary hearing before concluding that a defendant waived his right to conflict-free counsel. In *Rosenwald*, for example, a hearing was necessary because the record did not show whether the defendant was aware of his attorney's conflict of interest. 898 F.2d at 588; see also *Porter*, 805 F.2d at 939-940 (hearing needed to determine whether conflict of interest existed). Here, by contrast, there is no doubt that petitioner knew about—and accepted—Dowd's conflict of interest. In *Ziegenhagen*, the court of appeals remanded for an evidentiary hearing because, on the sparse record presented on the direct appeal, it could not "determine, without more, whether or not [the defendant] waived [his attorney's conflict of interest]." 890 F.2d at 941. In this case, however, the record shows conclusively that petitioner knowingly waived his right to conflict-free counsel.

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